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11

12 UNITED STATES DISTRICT COURT

13

14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 F. G. CROSTHWAITE, et al., as Trustees of
16 the OPERATING ENGINEERS' HEALTH
17 AND WELFARE TRUST FUND, et al.

Case No.: C12-4343 YGR

18 Plaintiffs,
19 v.
20 C. APARICIO CEMENT CONTRACTOR,
21 INC., a California corporation,
22 Defendant.

**JUDGMENT PURSUANT TO
STIPULATION**

23

24 IT IS HEREBY STIPULATED by and between the parties hereto, that Judgment may be
25 entered in the within action in favor of Plaintiffs OPERATING ENGINEERS' HEALTH AND
26 WELFARE TRUST FUND, et al. ("Plaintiffs" or "Trust Funds"), and against Defendant C.
27 APARICIO CEMENT CONTRACTOR, INC., ("Defendant") and/or alter egos and/or successor
28 entities, as follows:

29 1. Defendant entered into a valid Collective Bargaining Agreement with the
30 Operating Engineers Local 3 Trust Funds (hereinafter "Bargaining Agreement"). This Bargaining
31 Agreement has continued in full force and effect to the present time.

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1 2. Defendant has become indebted to the Trust Funds as follows:

2 January 2012	Contribution Balance	\$5,024.38	
3	20% Liquidated Damages	\$1,004.86	
4	10% Interest (through 8/31/12)	\$252.59	
5			\$6,281.83
6 February 2012	Contribution Balance	\$3,837.20	
7	20% Liquidated Damages	\$767.44	
8	10% Interest (through 8/31/12)	\$162.46	
9			\$4,767.10
10 March 2012	Contribution Balance	\$6,719.78	
11	20% Liquidated Damages	\$1,180.86	
12	10% Interest (through 8/31/12)	\$200.06	
13			\$8,100.70
14 April 2012	Contributions	\$3,343.69	
15	20% Liquidated Damages	\$570.30	
16	10% Interest (through 8/31/12)	\$73.24	
17			\$3,987.23
18 May 2012	Contributions	\$3,629.56	
19	20% Liquidated Damages	\$619.04	
20	10% Interest (through 8/31/12)	\$53.28	
21			\$4,301.88
22 June 2012	Contributions	\$5,195.74	
23	20% Liquidated Damages	\$886.18	
24	10% Interest (through 8/31/12)	\$39.94	
25			\$6,121.86
26 July 2012	Contributions	\$6,527.35	
27	20% Liquidated Damages	\$1,123.04	
28	10% Interest (through 8/31/12)	\$3.05	
29			\$7,653.44
30	10% Liquidated damages incurred on previously late-paid contributions (9/11 – 12/11)		\$2,379.72
31	10% Interest incurred on previously late-paid contributions (12/11)		\$31.69
32		SUB-TOTAL:	\$43,625.45
33	Attorneys' Fees (through 8/31/12)		\$648.00
34	Cost of Suit		\$350.00
35		TOTAL:	\$44,623.45

20 3. Defendant shall *conditionally* pay \$36,092.01, representing all of the above
 21 amounts, less liquidated damages in the amount of \$8,531.44. *This waiver is expressly*
 22 *conditioned upon the Trustees' approval upon timely compliance with all of the terms of this*
 23 *Stipulation*, as follows:

24 (a) Beginning on or before September 15, 2012, and continuing on or before
 25 the 15th day of each month thereafter for a period of twelve (12) months through August 15, 2013,
 26 Defendant shall pay to Plaintiffs \$3,169.00 per month;

27 (b) Payments may be made by joint check, cashier's check or other irrevocable

1 form of payment to be endorsed prior to submission;

2 (c) Defendant shall have the right to increase the monthly payments at any time
3 and there is no penalty for prepayment;

4 (d) Payments shall be applied first to unpaid interest and then to unpaid
5 principal. The unpaid principal balance shall bear interest at the rate of 10% per annum, from
6 September 1, 2012, in accordance with the Collective Bargaining Agreement and Plaintiffs' Trust
7 Agreements;

8 (e) Payments shall be made payable to the "*Operating Engineers' Trust Fund*," and delivered to Blake E. Williams, Esq. at Saltzman & Johnson Law Corporation, 44
9 Montgomery Street, Suite 2110, San Francisco, California 94104, or to such other address as may
10 be specified by Plaintiffs, **to be received on or before the 15th day of each month**;

11 (f) Defendant shall pay all additional costs and attorneys' fees incurred by
12 Plaintiffs in connection with collection and allocation of the amounts owed by Defendant to
13 Plaintiffs under this Stipulation, regardless of whether or not there is a default herein;

14 (g) Prior to August 15, 2013, the deadline for Defendant's last monthly
15 payment toward the balance owed under the Stipulation, Plaintiffs shall notify Defendant in
16 writing of the final amount due, including interest and additional attorneys' fees and costs, as well
17 as any other amounts due under the terms herein. All additional amounts due pursuant to the
18 provisions hereunder shall be paid in full with the final stipulated payment;

19 (h) At the time Defendant makes their last monthly payment toward the balance
20 owed under the Stipulation, Defendant may submit a written request for a waiver of liquidated
21 damages directed to the Board of Trustees, but sent to Saltzman and Johnson Law Corporation
22 with that payment. Defendant will thereafter be advised as to whether or not the waiver has been
23 granted. If the waiver is granted, upon bank clearance of Defendant's last payment of the balance
24 and confirmation that Defendant's account is otherwise current, Plaintiffs will file a Notice of
25 Satisfaction of Judgment with the Court. However, if the waiver is denied, monthly payments will
26 continue until all liquidated damages due have been paid; and
27

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3 4. Beginning with contributions due for hours worked by Defendant's employees
4 during the month of August 2012, which are due no later than September 15, 2012 and delinquent
5 if not received by September 25, 2012, and for every month thereafter, Defendant **shall remain**
6 **current in reporting and payment of any contributions** due to Plaintiffs under the current
7 Collective Bargaining Agreement and under all subsequent Collective Bargaining Agreements, if
8 any, and the Declarations of Trust as amended. **Defendant shall submit a copy of the**
9 **contribution report for each month, together with a copy of that payment check, either by**
10 **email to both bwilliams@sjlawcorp.com and glu@sjlawcorp.com, or by facsimile to Blake E.**
11 **Williams at 415-882-9287, or to such other fax number as may be specified by Plaintiffs,**
12 **prior to, or concurrent with, sending the payment to the Trust Fund office.** Failure by
13 Defendant to timely submit copies of current contribution reports and payments to Blake E.
14 Williams as described above shall constitute a default of the obligations under this agreement.

15 5. Defendant shall make full disclosure of all jobs on which they are working by
16 providing Plaintiffs with an ongoing and updated list of jobs including, but not limited to, the
17 name and address of job, general contractor information, certified payroll if a public works job,
18 and period of work. **Defendant shall submit said updated list each month together with the**
19 **contribution report (as required by this Stipulation) either by email to both**
20 **bwilliams@sjlawcorp.com and glu@sjlawcorp.com, or by facsimile to Blake E. Williams at**
21 **415-882-9287.** This requirement remains in full force and effect regardless of whether or not
22 Defendant has ongoing work. In this event, Defendant shall submit a statement stating that there
23 are no current jobs. A blank job report form is attached hereto for Defendant's use, as **EXHIBIT**
24 **A. To the extent that Defendant is working on a Public Works job, or any other job for**
25 **which Certified Payroll Reports are required, at Plaintiffs' request, copies of said Reports**
26 **will be emailed or faxed to Blake E. Williams, concurrently with their submission to the**
27 **general contractor, owner or other reporting agency.** Failure by Defendant to timely submit
28 updated job lists shall constitute a default of the obligations under this agreement.

1 6. Failure by Defendant to remain current in reporting or payment of contributions
 2 shall constitute a default of the obligations under this agreement. Any such unpaid or late paid
 3 contributions, together with 20% liquidated damages and 10% per annum interest accrued on
 4 contributions, shall be added to and become a part of this Judgment and subject to the terms
 5 herein. Plaintiffs reserve all rights available under the applicable Bargaining Agreement and
 6 Declarations of Trust of the Trust Funds for collection of current and future contributions, and for
 7 any additional past contributions not included herein as may be determined by Plaintiffs, pursuant
 8 to employee timecards or paystubs, by audit, or other means, and the provisions of this agreement
 9 are in addition thereto. Defendant specifically waives the defense of the doctrine *res judicata* as to
 10 any such additional amounts determined as due.

11 7. **Audit:** Should the Trust Funds request an audit of Defendant's payroll records in
 12 order to confirm proper reporting and payment of contributions pursuant to the Bargaining
 13 Agreement, any failure by Defendant to comply with said request shall constitute a default of the
 14 obligations under this Agreement.

15 (a) In the event that Defendant has an audit in progress, but not yet complete
 16 (and thus not included herein), and amounts are found due, Plaintiffs shall send a written demand
 17 to Defendant by first class mail for payment in full of the amounts found due in the audit,
 18 including contributions, liquidated damages, interest and audit fees;

19 (b) Defendant will be provided with ten (10) days in which to review the audit,
 20 and provide evidence to contest the findings in the event that Defendant does not agree with the
 21 total found due. Once the ten (10) day review period expires, in the event that the audit is not
 22 contested, payment in full shall be delivered to Blake E. Williams;

23 (c) If the audit is contested, and Defendant provides documentation in support
 24 of the dispute, Defendant shall be notified as to whether revisions will be made to the audit. If
 25 revisions are not made, payment will be immediately due;

26 (d) If revisions are made to said audit as a result of the dispute, payment in full
 27 of the revised amount shall be due within ten (10) days of the revised billing;

28 (e) If Defendant is unable to make payment in full, Defendant may submit a

1 written request to revise this Judgment, modifying the payment plan (by monthly amount and/or
 2 payment term), to add the amounts found due in the audit to this Judgment, subject to the terms
 3 herein. If the Judgment is so revised, Defendant shall execute the Amended Judgment or
 4 Amendment to Judgment within ten (10) days of Plaintiffs' preparation of said Amended
 5 Judgment or Amendment to Judgment. Failure to execute the revised agreement shall constitute a
 6 default of the terms herein; and

7 (f) Failure by Defendant to submit either payment in full or a request to add the
 8 amounts due to this Judgment within ten (10) days of the date of Plaintiffs demand shall constitute
 9 a default of the obligations under this agreement. All amounts found due on audit shall
 10 immediately become part of this Judgment.

11 8. Carolyn Aparicio acknowledges that she is the Secretary/Treasurer of C. Aparicio
 12 Cement Contractor, Inc. (hereinafter "Guarantor"), and confirms that she is personally
 13 guaranteeing, and will be jointly and severally liable, the amounts due pursuant to the terms of this
 14 Stipulation and further acknowledges that all affiliates, related entities, purchasers, and successors
 15 in interest to C. APARICIO CEMENT CONTRACTOR, INC., as well as any other entity in
 16 which she has an interest, shall also be bound by the terms of this Stipulation as Guarantors, and
 17 also consent to this Court's jurisdiction as well as the use of a Magistrate Judge.

18 9. In the event that any check is not timely submitted, is submitted by
 19 Defendant/Guarantors but fail to clear the bank, or is unable to be negotiated for any reason for
 20 which Defendant/Guarantors are responsible, this too shall be considered to be a default on the
 21 Judgment entered. If Defendant/Guarantors fail to submit contribution reports, and/or certified
 22 payroll reports (if any) and/or job lists, and/or fail to comply with *any* of the terms of the
 23 Stipulation herein, this too shall constitute a default.

24 10. If a default occurs, Plaintiffs shall make a written demand, sent to
 25 Defendant/Guarantors by facsimile and first class mail to cure said default. Default will only be
 26 cured by the issuance of a replacement, cashier's check if the default is caused by a failed check,
 27 or at the request of Plaintiffs, to be delivered to Saltzman and Johnson Law Corporation *within*
 28 *seven (7) days* of the date of the notice from Plaintiffs. If Defendant/Guarantors elect to cure said

1 default, and Plaintiffs elect to accept future payments, all such payments shall be made by
 2 cashier's check if the default is caused by a failed check.

3 11. In the event the default is not cured, all amounts remaining due hereunder, as well
 4 as any additional amounts due pursuant to the terms herein, shall be due and payable on demand
 5 by Plaintiffs as follows:

6 (a) The entire amount of **\$44,623.45** plus interest, reduced by principal
 7 payments received by Plaintiffs, but increased by any unpaid contributions then due, plus 20%
 8 liquidated damages and 10% per annum interest thereon, shall be immediately due, together with
 9 any additional attorneys' fees and costs incurred in this action, including those identified under
 10 section (d) below;

11 (b) A Writ of Execution may be obtained against Defendant/Guarantors without
 12 further notice, in the amount of the unpaid balance, plus any additional amounts under the terms
 13 herein, upon declaration by a duly authorized representative of the Plaintiffs setting forth any
 14 payment theretofore made by or on behalf of Defendant/Guarantors and the balance due and
 15 owing as of the date of default. Defendant/Guarantors specifically consent to the authority of a
 16 Magistrate Judge for all proceedings, including, but not limited to, Plaintiffs' obtaining a Writ of
 17 Execution;

18 (c) Defendant/Guarantors waive notice of Entry of Judgment and expressly
 19 waive all rights to stay of execution and appeal. The declaration or affidavit of a duly authorized
 20 representative of Plaintiffs as to the balance due and owing as of the date of default shall be
 21 sufficient to secure the issuance of a Writ of Execution; and

22 (d) Defendant/Guarantors shall pay all additional attorneys' fees and costs
 23 incurred by Plaintiffs in connection with this matter, including those incurred for collection and
 24 allocation of the amounts owed by Defendant/Guarantors to Plaintiffs under this Stipulation. The
 25 additional attorneys' fees and costs shall be paid by Defendant/Guarantors as set forth above,
 26 regardless of whether or not Defendant/Guarantors default under the terms of this Stipulation.

27 12. Any failure on the part of the Plaintiffs to take any action against
 28 Defendant/Guarantors as provided herein in the event of any breach of the provisions of this

1 Stipulation shall not be deemed a waiver of any subsequent breach by the Defendant/Guarantors of
2 any provisions herein.

3 13. In the event of the filing of a bankruptcy petition by Defendant/Guarantors, the
4 parties agree that any payments made pursuant to the terms of this Judgment, shall be deemed to
5 have been made in the ordinary course of business as provided under 11 U.S.C. Section 547(c)(2)
6 and shall not be claimed as a preference under 11 U.S.C. Section 547 or otherwise.
7 Defendant/Guarantors nevertheless represent that no bankruptcy filing is anticipated.

8 14. This Stipulation is limited to the agreement between the parties with respect to the
9 delinquent contributions and related sums enumerated herein, owed by Defendant/Guarantors to
10 the Plaintiffs. This Stipulation does not in any manner relate to withdrawal liability claims, if any.
11 Defendant/Guarantors acknowledge that the Plaintiffs expressly reserve their right to pursue
12 withdrawal liability claims, if any, against Defendant/Guarantors as provided by the Plaintiffs'
13 Plan Documents, Trust Agreements incorporated into their Collective Bargaining Agreement, and
14 the law.

15 15. Should any provision of this Stipulation be declared or determined by any court of
16 competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and
17 enforceability of the remaining parts, terms or provisions shall not be affected thereby and said
18 illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this
19 Stipulation.

20 16. This Stipulation contains all of the terms agreed by the parties and no other
21 agreements have been made. Any changes to this Stipulation shall be effective only if made in
22 writing and signed by all parties hereto.

23 17. This Stipulation may be executed in any number of counterparts and by facsimile,
24 each of which shall be deemed an original and all of which shall constitute the same instrument.

25 18. The parties agree that the Court shall retain jurisdiction of this matter until this
26 Judgment is satisfied.

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19. All parties represent and warrant that they have had the opportunity to be or have been represented by counsel of their own choosing in connection with entering this Stipulation under the terms and conditions set forth herein, and that they enter into this Stipulation voluntarily and without duress.

Dated: November 27, 2012

C. APARICIO CEMENT CONTRACTOR, INC.

By: _____ /s/
Andrew John Aparicio, RMO/CEO/President

Dated: November 27, 2012

CAROLYN APARICIO, Secretary/Treasurer

By: _____ /s/
Individually as personal guarantor

Dated: October , 2012

By: _____
Individually as personal guarantor

Dated: October , 2012

By: Individually as personal guarantor

Dated: November 29, 2012

OPERATING ENGINEERS LOCAL 3 TRUST FUNDS

By: _____
David E. Hayner
Collections Manager

Dated: November 27, 2012

**SALTZMAN & JOHNSON LAW
CORPORATION**

By: _____ /s/
Blake E. Williams, Esq.
Attorneys for Plaintiffs

IT IS SO ORDERED

IT IS SO ORDERED.
IT IS FURTHER ORDERED that all dates on calendar in this matter are **VACATED** accordingly.

Dated: December 10, 2012

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

Exhibit A***JOB REPORT FORM***

*** Updated report must be emailed to mstafford@sjlawcorp.com or
 faxed to Blake E. Williams Esq., at (415) 882-9287
 on or before the 15th day of each month ***

Employer Name: **C. APARICIO CEMENT CONTRACTOR, INC.**

Report for the month of _____ year of _____ Submitted by (name): _____

Project Name:			
Project Address:			
General Contractor:			
General Contractor Address/Tel. #:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
General Contractor Address/Tel. #:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
General Contractor Address/Tel. #:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

*** Attach additional sheets as necessary ***